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IN THE

Supreme Court of the United States

October Term, 1963

No. 1085

MILTON PARNESS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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MILTON PARNESS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Milton Parness, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on March 13, 1964.

Citations to Opinions Below

The letter opinion of District Judge WORTENDYKE denying petitioner's motion for a new trial (Rec. pp. 592a-596a), is unreported and is printed in Appendix B hereto, *infra*

pp. 4a-8a. The unreported per curiam opinion of the Circuit Court of Appeals affirming the conviction (Rec. Vol. I, Additional Papers, p. 2) is printed in Appendix B hereto, *infra*, p. 3a.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on March 13, 1964 (Rec. Vol. I, Additional Papers, post p. 312a; Appendix B, hereto, *infra*, pp. 9a-10a).

On April 2, 1964, Mr. Justice BRENNAN signed an order granting petitioner an extension of time in which to file the instant petition to and including May 11, 1964. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

Questions Presented for Review

1. Can petitioner's conviction for conspiracy be sustained if, apart from the *hearsay* assertions of two alleged co-conspirators awaiting disposition of their own cases, there was no proof "aliunde" connecting petitioner to the alleged conspiracy and indicating his knowledge of either its purpose or scope?

2. Can petitioner's conviction for conspiracy be sustained if the government failed to establish that petitioner *knew* that one of the objects of the alleged conspiracy was to transport the securities in question *in interstate commerce*?

3. After the government furnished a bill of particulars indicating that the alleged stolen securities involved in

each count were the same, did the later admission into evidence of testimony concerning entirely different securities constitute reversible error especially where such testimony was comprised almost entirely of the hearsay statements of the alleged co-conspirators?

Statutes Involved

The statutory provisions involved are Sections 371 and 2314 of Title 18 U. S. C. They are printed in Appendix A, *infra*, pp. 1a-2a.

Statement of the Case

Petitioner and a co-defendant, Grimmett, were indicted on May 17, 1962, by a Federal grand jury sitting at Newark, New Jersey (Rec. pp. 6a-9a). The charges set forth by the grand jury against petitioner constituted crimes against the United States under Title 18 U. S. C. Secs. 371 and 2314 and were, accordingly, cognizable in the United States Federal District Court for the District of New Jersey where the indictment was filed. The first count of the three-count indictment charged that petitioner, the co-defendant Grimmett, two named co-conspirators—Favata and MacLaren—and others unknown to the grand jury, conspired to transport between New York City, East Paterson, New Jersey, New York City, and Oklahoma City, securities of a value of more than $5,000, knowing the same to have been stolen and forged; further, that it was a part of such conspiracy that "approximately $1,000,000 of stolen securities would be sold" by petitioner to Grimmett with

the understanding that these would be forged and pledged as collateral for loans (Rec. pp. 6a-8a).

Count two charged petitioner and Grimmett with the substantive crime of transporting stolen securities from New York to New Jersey. Count three, alleging the same dates, charged in effect that petitioner and Grimmett had caused the transportation back into New York City of the same securities in a forged, altered, and counterfeited state (Rec. pp. 6a-9a).

Petitioner was found guilty on the conspiracy count and acquitted of the two substantive crimes charged. The defendant Grimmett was convicted on all counts (Rec. pp. 502a-503a). Petitioner was sentenced to five years imprisonment (Rec. p. 597a), and is presently at liberty, on bail. He has never before been convicted of a crime.

a. The government failed to establish, by proof independent of the hearsay statements of two alleged co-conspirators awaiting trial, petitioner's connection with and knowledge of the scope and purpose of the alleged conspiracy.

In order to establish petitioner's guilt upon the charge of conspiracy it was necessary for the government to demonstrate that petitioner was a member of the conspiracy alleged in the first count of the indictment, that he acted in furtherance of such conspiracy, and that he knew of its scope and purposes. While the record herein is replete with instances of the hearsay assertions of alleged conspirators unknown to petitioner concerning what petitioner's co-defendant had said about one "Milt" (petitioner's first name is "Milton"), there is not an iota of independent proof connecting petitioner to the alleged conspiracy.

Against this background, we set forth the government's proof as it bears upon this issue.

The proof adduced by the government tended to establish that various so-called "blue chip" securities were stolen from the homes of one Bernard Hans and Fred Plafe during the spring and summer of 1961, and that these were the securities which the defendant Grimmett had caused to be forged and pledged to an Oklahoma insurance company in late November 1961, as collateral for a loan. The pledge and securities came to the attention of the authorities in February 1962, when the securities were sold in the open market by the insurance company after Grimmett had defaulted in repaying the loan.

The only proof *aliunde* offered by the Government to establish petitioner's connection and commitment to the conspiracy came from the government witnesses Orseck and Gullifur. None of the government's other witnesses knew petitioner and none had dealt with him either directly or indirectly.

Orseck testified that he is a lawyer and that Grimmett, a client, arranged to see him at Orseck's office in New York City in late September or early October 1961 (Rec. p. 32a). Orseck knew Grimmett was an officer of American States Oil Co. whose stock was traded over the counter (Rec. p. 34a). Grimmett entered Orseck's office with "Bernard Hans"—not the same person produced by the government as the true owner of the stocks here involved—, petitioner, and an unidentified person who seated himself at the other end of the room. Orseck did not know in what order these visitors had first arrived at his waiting room (Rec. pp. 33a, 35a-36a). Grimmett explained that "Hans" was interested in purchasing American States Oil stock (Rec. p. 35a) and

"Hans" stated that he did not have cash to complete the transaction but would pay for the stock with securities in his possession (Rec. p. 35a). Grimmett said he intended to pledge the securities to be provided by "Hans" as collateral for a loan (Rec. pp. 37a-38a). Grimmett asked to see the securities and, after receiving an envelope, stepped out of the room with Parness (Rec. pp. 36a-37a). Thereafter, the two returned and "he" (apparently Grimmett) handed Orseck some of the securities bearing the name Bernard Hans (Rec. p. 37a). There were no endorsements on the securities and Orseck observed that it was pointless to proceed until they were endorsed and the signatures had been guaranteed (Rec. p. 40a). "Hans" said that he would have them endorsed and Parness stated that "Hans" would bring enough securities the next day to cover the entire transaction (Rec. pp. 39a-41a). "Hans" sought to establish his identity with a business card, but Orseck would not proceed without the required endorsements (Rec. p. 41a).

The following morning Orseck, Grimmett, petitioner, and "Hans" met again in Orseck's office (Rec. p. 41a). The securities were still unendorsed and "Hans" excused himself to go to a bank to have the certificates endorsed and guaranteed. The others remained behind (Rec. p. 42a). At about 1:30 p.m. "Hans" telephoned explaining that he was delayed. "Hans" never returned and the waiting group disbanded in the middle of the afternoon (Rec. pp. 43a-44a).

Gullihur testified that he is the son-in-law of Grimmett and that on January 1, 1962, he came to New York City pursuant to Grimmett's instructions to deliver two $25,000 checks to petitioner (Rec. pp. 362a-364a). The checks were payable to the order of Gullihur. He did not

know what the $50,000 was for and his only instructions were to deliver the checks (Rec. p. 377a). The next day he met with petitioner who refused to accept the checks which Gullihur had endorsed in blank (Rec. pp. 364a, 366a). In the presence of petitioner, Gullihur telephoned Grimmett who was "ill in bed" in Oklahoma (Rec. p. 366a). Gullihur testified that, in accordance with Grimmett's instructions to him, he cashed the checks and delivered the proceeds to petitioner (Rec. pp. 367a-368a). He subsequently saw petitioner and thereafter returned to Oklahoma (Rec. pp. 370a-372a).

As previously indicated, the foregoing constituted the entire sum and substance of the government's offer of proof—independent of the hearsay statements of alleged co-conspirators—to establish petitioner's alleged criminal involvement in the conspiracy set forth in the first count of the indictment. Despite the very meagre nature of this testimony, petitioner took the stand and testified fully with respect to the incidents described by Orseck and Gullihur. As the following material indicates, nothing testified to by petitioner in any fashion supplied the government with the missing ingredients of its case.

Petitioner testified that in September 1961, in connection with business dealings in California with a friend of his, Stillwell, an officer of Banker's Life & Casualty Company, he met a man named Ray Baker (Rec. pp. 418a-419a). On or about October 11, 1962, Baker introduced him to the defendant Grimmett in New York, who told petitioner he was in need of money for oil-drilling operations of his company at Long Beach, California (Rec. pp. 420a-421a). It was suggested that petitioner act as an intermediary for Grimmett with Stillwell to effect a borrowing of funds

from Stillwell's company (Rec. p. 422a). Petitioner got in touch with Stillwell, who refused to make a loan on over-the-counter stocks (Rec. pp. 422a-423a).

A day or so later, Baker telephoned petitioner and told him that a friend of his had some "blue chip" stocks which he was willing to pledge with Grimmett (Rec. p. 423a). Petitioner came to New York to see Baker and was introduced by him to a "Bernard Hans" (Rec. pp. 424a-427a). Some time thereafter, petitioner went to the office of Grimmett's attorney, Orseck, where he met Grimmett (Rec. p. 427a). While waiting there, "Hans" came in with another man (Rec. p. 427a). Petitioner had brought no stocks with him, but "Hans" had (Rec. p. 427a). Thereafter, the party entered Orseck's inner office and there petitioner asked "Hans" if he had brought the securities with him (Rec. p. 428a). "Hans" handed the securities to petitioner who thumbed through them (Rec. p. 428a). Petitioner then handed the securities to Grimmett who passed them on to Orseck (Rec. p. 428a). "Hans" stated that there were "Around three or four hundred thousand dollars" in securities and that he would "bring the rest when they are needed" (Rec. pp. 428a-429a). Orseck then observed that the securities had not been endorsed, that endorsements were necessary, and that the signature required bank certification (Rec. p. 429a). "Hans" offered various indicia of identification which Orseck rejected while stating the matter should be put over for a day pending endorsement and certification of the securities (Rec. p. 429a).

The following morning, the group reconvened at Orseck's office (Rec. p. 430a). As "Hans" had still not procured the necessary endorsements and certifications, he left

the meeting to visit a bank in Queens County, New York, to put the securities in order (Rec. p. 430a). At 1:30 p.m. "Hans" telephoned that he was delayed (Rec. p. 430a). After about an hour, Orseck excused himself and the meeting ended without the return of "Hans" (Rec. p. 431a). Petitioner never saw "Hans" again and so far as he knew, the Orseck transaction was never completed (Rec. p. 431a).

Concerning Gullihur, petitioner stated that on January 2, 1962, Gullihur telephoned him from New York City and introduced himself as Grimmett's son-in-law (Rec. pp. 435a-436a). Gullihur explained that he was having difficulty cashing some checks and requested petitioner's assistance (Rec. p. 436a). Petitioner visited Gullihur, but as it was late in the day the banks were closed and he could be of no assistance (Rec. p. 436a). Gullihur telephoned Grimmett who asked petitioner to help in the matter and petitioner agreed to this, advising Gullihur that in the event Gullihur could not cash the checks in New York the following day, petitioner would arrange to do so at his own bank in New Jersey (Rec. p. 437a).

A few days later Gullihur telephoned petitioner stating he had cashed the checks, was "tired of laying around [his] hotel" and wanted to join petitioner for dinner (Rec. 437a). Petitioner arranged to have a drink with Gullihur later that night (Rec. p. 437a). Petitioner denied ever asking for or receiving any cash from Gullihur (Rec. pp. 459a 460a, 463a).

b. The hearsay references to "Milt" by the alleged co-conspirators provided the only basis upon which the jury could have found that petitioner participated in the conspiracy.

Apart from the testimony of Orseck and Gullihur, the government's case depended almost entirely upon that of the alleged co-conspirators Favata and MacLaren whose testimony was for the most part identical. Both of these government witnesses had been separately indicted and were awaiting trial. They testified, in essence, that in November 1961, Grimmett informed them that he had access to stolen securities which he wanted them to endorse and certify in connection with a plan to pledge the securities as collateral for a loan (Rec. pp. 69a-80a). In return for their services, he would give them a "loan" of $50,000, of which they were in sore need in connection with their own stock brokerage business (Rec. p. 80a). Favata and MacLaren attempted, without success, to arrange for a loan on the stolen stock at their own bank (Rec. pp. 84a-85a), and twice brought the certificates into New Jersey for the purpose of either forging stock powers or endorsements upon the securities themselves (Rec. pp. 80a-90a). At about the end of November 1961, they delivered the forged securities to Grimmett in New York in connection with a loan arranged for with an Oklahoma insurance company (Rec. pp. 91a-94a).

Both Favata and MacLaren acknowledged that neither of them had ever met petitioner or dealt with him (Rec. pp. 163a, 223a, 281a-283a). Favata stated, however, that Grimmett had told him "Milt and the boys" or "Milt" had provided the stolen securities and would supply another batch apart from the one pledged with the Oklahoma in-

surance company (Rec. pp. 79a, 87a-88a, 96a, 110a, 225a and see pp. 153a, 222a, 262a). Favata had no idea, however, who "Milt" was (Rec. pp. 169a-179a) and did not hear the name "Parness" until January 1962 (Rec. pp. 222a, 225a). He admitted conspiring with MacLaren and Grimmett, but did not consider that petitioner was ever involved in his transactions with either of those two (Rec. p. 225a).

Favata gave additional testimony concerning the visit of Gullihur to New York City on January 2, 1962 (Rec. pp. 96a, 110a). In this connection he stated that Grimmett had telephoned him from Oklahoma near the end of December 1961, and informed him that "Milt" expected him, Grimmett, to be in New York with $50,000 on January 2, 1962, for another batch of securities (*Ibid.*). Thereafter, he met Gullihur and assisted him, without success, in trying to locate petitioner (Rec. p. 112a).

MacLaren, testifying similarly, stated that Grimmett told him the source of additional stolen securities would be one "Milt" (Rec. p. 262a) and that, concerning an expected delivery of stolen securities, Grimmett "had been double crossed by Milt." (Rec. p. 272a). MacLaren had no idea, however, who "Milt" was, or even whether there was any truth to Grimmett's assertions that a second block of stolen stock would actually be forthcoming (Rec. p. 283a). As far as MacLaren was concerned, petitioner had nothing whatever to do with their dealings with Grimmett and the name "Parness" meant absolutely nothing to him in the context of his transactions with Grimmett (Rec. pp. 281a, 329a).

The testimony elicited by the prosecutor from Favata and MacLaren concerning what Grimmett had told them about "Milt" so colored the jury's view of petitioner that

this testimony, insufficient as a matter of law to establish a *prima facie* case of petitioner's connection to the conspiracy, without doubt, formed the basis for the jury's finding of petitioner's participation in the alleged crime.

Testimony adduced from the witness Berger, an attorney for the Oklahoma Insurance Company, that late in January 1962, Grimmett told him "Parness" "had messed him up" (Rec. p. 346a), had a like effect and was doubly prejudicial for recalling a conversation that occurred well after the alleged conspiracy would have ended (see *infra*, Point 3, p. 19).

Reasons for Granting the Writ

1. The instant case presents another example whereby the guilt of a defendant upon a charge of conspiracy rests *not* upon independent proof of his participation in, or connection with, the conspiracy, but upon the highly suspect hearsay testimony of alleged co-conspirators awaiting the outcome of their own cases. In the case at hand, the vice of such testimony was even more flagrant, as the jury voted to acquit petitioner of each of the substantive crimes with which he was charged. We claim, therefore, that in the circumstances here depicted, the District Court erred in failing to grant petitioner's motions for judgment of acquittal on all counts, and that the court was similarly in error in denying petitioner's subsequent timely motion for a new trial. Beyond this, we urge the case for review as one which relates directly and without encumbering side issues which might blunt the point to the Court's long expressed concern that conspiracy trials not be employed as a means by which the prosecution fashions "a dragnet to

draw in all substantive crimes". *Direct Sales Company* v. *United States*, 319 U.S. 703, 711.

It has been firmly established in this Court that "a conviction for conspiracy under 18 U.S.C. 371 cannot be sustained unless there is 'proof of an agreement to commit an offense against the United States. *Pereira* v. *United States*, 347 U.S. 1'." *Ingram* v. *United States*, 360 U.S. 672. Such proof must establish that the party charged participated in the corrupt agreement with knowledge of its purpose. *United States* v. *Falcone*, 311 U.S. 205, 210; *Twitchell* v. *United States*, 313 F. 2d 425, 428 (9 Cir. 1963); *Dahly* v. *United States*, 50 F. 2d 37, 42 (8 Cir. 1931), and with a specific intent to commit the objects of the conspiracy. *United States* v. *Woll*, 157 Fed. Supp. 704, 707-708 (D.C. E.D. Pa., 1957); *Mazurosky* v. *United States*, 100 F. 2d 958 (9 Cir. 1939). In addition to this, and most importantly in connection with the record herein, the defendant's connection with the conspiracy must have been established independently of the assertions of alleged co-conspirators made to third parties (*Glasser* v. *United States*, 315 U.S. 60, 74-75; *Minner* v. *United States*, 57 F. 2d 506, 511 [10 Cir. 1932]; *Taylor* v. *United States*, 260 F. 2d 737 [D.C. Cir. 1958]).

The proof adduced by the prosecutor herein failed to meet any of the criteria set forth above. Insofar as petitioner's connection with the alleged conspiracy is concerned, the government was able to show only that petitioner was present at two meetings in the office of an attorney where the hypothecation of the "Hans" securities was briefly discussed (cf. *United States* v. *Di Re*, 332 U.S. 581, 593; *United States* v. *Moloney*, 200 F. 2d 344, 347. [7 Cir. 1952]). There was not a shred of evidence showing that

petitioner knew that "Hans" was an impostor, that the securities presented to Orseck had actually been stolen, or that petitioner's presence was in the knowledgeable advancement of any conspiracy to dispose of the securities (see *United States* v. *Fabri Garment Co.*, 262 F. 2d 631, 640 [2 Cir. 1958], cert. den. 359 U.S. 989). No continuous course of dealings, or "prolonged and interested cooperation" between petitioner and "Hans" or any of the others was shown which might have given rise to an inference of guilty knowledge (*United States* v. *Aviles*, 274 F. 2d 179, 189-190 [2d Cir. 1960]; *Van Huss* v. *United States*, 197 F. 2d 120, 121 [10 Cir. 1952]).

At all times during the Orseck meeting, all those present including Orseck, regarded the securities under consideration as actually belonging to "Hans", whose name appeared on the certificates themselves. The fact that the securities were touched by petitioner in Orseck's office was meaningless in the circumstances. That factor could not supply even an inference of dominion or control over the securities as all the interested parties who were present—including Orseck—handled the very same securities. And, clearly, nothing that happened in Orseck's office can supply the wholly speculative and unwarranted inference that petitioner was knowledgeably connected to some criminal combination or even knew that the securities had any unlawful origin. Further, when the first Orseck meeting disbanded, it was "Hans" alone who undertook to have the stock certificates endorsed and certified, and it was not shown that, at any time prior to, during, or after the Orseck meeting, the securities were in the possession of anyone else but "Hans". When "Hans" failed to return with the securities properly endorsed and certified,

the proposed transaction was entirely abandoned. Had petitioner actually been involved in a conspiracy to dispose of the securities in question, and concerned with their handling and safety, it is strange indeed that he never again came into the presence of, or dealt with any of, the persons who subsequently came into contact with the securities.

How the securities came into the possession of Grimmett, Favata, and MacLaren for delivery in New York City to the agents of an Oklahoma insurance company was also never established by independent proof. Indeed, the alleged co-conspirators Favata and MacLaren freely acknowledged that they had at no time either met or dealt with the petitioner and did not consider him a participant in their dealings with Grimmett. Not even his name meant anything to them. In this situation, there was clearly no proof whatever of petitioner's connection to any conspiracy—much less one having interstate implications—, and nothing in the testimony of Grimmett's son-in-law, Gullihur—who denied any knowledge of the conspiracy or the purpose of an alleged payment to petitioner—altered this fact.

Taken as a whole, this evidence failed to show that petitioner's presence and conduct at Orseck's office "logically and consistently" pointed to the existence of a conspiracy in which he was a participant (*Butler* v. *United States*, 197 F. 2d 561 [10 Cir. 1952]). Neither did petitioner's presence or utterances indicate that he dealt "understandingly" with either Grimmett or "Hans", or the two of them, in connection with some projected criminal enterprise (*American Cyanamid Co.* v. *Sharff*, 309 F. 2d 790 [3 Cir. 1962]). In short, the case presented by the government depended upon the most rank speculation (see *United States*

v. *Rappaport*, 292 F. 2d 261, 264 [3 Cir. 1961]; *United States* v. *Moloney*, 200 F. 2d 344, 347 [7 Cir. 1952]) in order to by-pass the firm requirement that there be produced in the first instance independent proof of petitioner's informed and knowing participation in a criminal conspiracy having interstate ramifications (*Harlow* v. *United States*, 301 F. 2d 361 [5 Cir. 1962], cert. den. 371 U.S. 814; *Williams* v. *United States*, 289 F. 2d 598 [9 Cir. 1961]).

Upon a fair appraisal of the evidence, therefore, the case should never have been submitted to the jury. The jury's finding of guilt upon the conspiracy charge, however, is not difficult to fathom for the record was rife with testimony from both Favata and MacLaren that Grimmett had told them that one "Milt" would be the source of the stolen securities from which Grimmett expected to pay them for past criminal services. The "hearsay" of these alleged co-conspirators was thus lifted by "its own boot straps to the level of competent evidence". (*Glasser* v. *United States*, 315 U.S. 60, 74-75), and the conspiracy was "proved," if at all, "by evidence that is admissible only upon the assumption that the conspiracy existed" (*Krulewich* v. *United States*, 336 U.S. 440, 450, concurring opinion of JACKSON, J.; *United States* v. *Pagano*, 224 F. 2d 682, 684 [2 Cir. 1955]).

2. To warrant submission of the conspiracy count to the jury in the instant case, it was necessary for the government to present at least *prima facie* proof of the knowledge and intent of petitioner in regard to the interstate aspect of the offense (*Harms* v. *United States*, 272 F. 2d 478 [4 Cir. 1959]; *United States* v. *Crimmins*, 123 F. 2d 271 [2 Cir. 1941]). On this subject, the District Court observed

that the certificates in question "indicated that the transfer agents of the various corporations were located in various States, in addition to New York, and Parness was therefore on notice that in order to effect a transfer of ownership of the stock on the books of the respective corporations, it would be necessary for at least some of the stock certificates to be transported interstate" (Rec. p. 593a). The District Court's conclusion on this phase of the case is not only unwarranted for assuming that petitioner *actually knew* where all of the transfer agents would be located—but was additionally objectionable and incorrect for overlooking the fact that there was no testimony in the record that it was ever an object of the conspiracy to *sell* the securities. Indeed on this subject, Favata testified that Grimmett had told him that the securities would merely be pledged as collateral, repurchased and destroyed (Rec. p. 79a), and that no risk could be taken which might permit the securities to "show up at the transfer agent" (Rec. p. 85a).

In the government's brief in the Court of Appeals, it was observed by the prosecutor that the interstate transportation feature of the crime charged was satisfied by the statement of Grimmett in Orseck's office that the securities "might" be pledged with Grimmett's brother's bank in *Oklahoma* (government's brief below, p. 30). On this score, we point out that the remark actually attributed to Grimmett was that the securities were to be hypothecated and if there was difficulty in securing a loan, the securities "could" be pledged in Oklahoma "if need be" (Rec. p. 39a). That statement hardly portrayed an understanding among the alleged conspirators that the securities *would be* sent out of the State and in any case failed to meet the

standard imposed in *United States* v. *Crimmins*, 123 F. 2d 271, 273 (2 Cir. 1941) where the Court stated:

> "* * * there can be no conspiracy to 'cause' stolen securities 'to be transported in interstate * * * commerce' unless it is understood to be part of the project that they *shall* cross state lines." (Italics supplied.)

At all events, as the facts developed, Grimmett actually delivered the stolen securities to the agents of the Oklahoma insurance company in a hotel *in New York City*.

3. Prior to the trial, petitioner made a demand for a bill of particulars and sought therein the answers to the following questions, among others:

> "19. Are the securities referred to in Count II of the Indictment the same as referred to in Count I and or Count III?
>
> "20. Are the securities referred to in Count III the same as referred to in Count I and Count II of the Indictment?" (Rec. pp. 10a-11a)

The government's oral answer to these questions was: "The securities referred to in Count 2 and the securities referred to in Count 3 are the same securities referred to in Count 1" (Rec. pp. 12a, 98a, 102a).

From the government's reply, it appeared that all three counts of the indictment dealt with the same securities, namely, those which Grimmett had pledged at the end of November 1961. In this situation, the government had effectively limited itself to adducing proof only with respect to these securities (Federal Rules of Criminal Procedure, Rule 7(f), 18 U.S.C.; *United States* v. *Neff*, 212 F. 2d 297,

309 [3 Cir. 1954]). Instead, over petitioner's strenuous objections, the government proceeded to elicit from Favata and MacLaren, testimony involving entirely different securities which were to be acquired in the period subsequent to the November transfer. By this tactic, the government was able to introduce into evidence the highly prejudicial hearsay statements of Favata and MacLaren that Grimmett had informed them these new securities would be provided to Grimmett by "Milt". Through this device the prosecutor was also successful in introducing into evidence the testimony of Gullihur and the Berger hearsay (*supra*, p. 13) which dealt entirely with events coming well after the delivery in New York City of the stock referred to in all three counts of the indictment.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

SEYMOUR KLEINMAN
Counsel for Petitioner

Of Counsel:
MARVIN B. TEPPER
LAWRENCE K. FEITELL

APPENDIX A

Statutory Provisions Cited

18 U. S. C. §371

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

18 U. S. C. §2314

"Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice

to defraud that person of money or property having a value of $5,000 or more; or

"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or tax stamps, or any part thereof—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

"This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country. As amended July 9, 1956, c. 519, 70 Stat. 507; Oct. 4, 1961, Pub. L. 87-371, 75 Stat. 802."

APPENDIX B

Opinions and Judgments Below

A. Opinion of the Court of Appeals

PER CURIAM.

We have carefully examined the record in these appeals with particular reference to the points raised by both appellants. We are satisfied that there was no substantial error in the trial with reference to either defendant.

The judgments of the district court against the defendants will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

(Filed March 13, 1964)

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B. Letter Opinion of the District Court

April 11, 1963*

Re: Cr. 224-62—United States of America vs.
Milton Parness

David M. Satz, Jr., Esq.,
United States Attorney
Newark 1, New Jersey

Attn.: Sanford M. Jaffe, Esq.
Assistant U. S. Attorney

S. M. Chris Franzblau, Esq.,
17 Academy Street,
Newark 2, New Jersey

Samuel H. Nelson, Esq.,
11 Commerce Street,
Newark 2, New Jersey

Gentlemen:

The named defendant was found guilty by a jury on February 7, 1963 of a violation of 18 U. S. C. 371. He has moved the Court for a new trial and at the conclusion of the argument on April 8, 1963, the Court reserved decision.

The motion of Milton Parness for a new trial must be denied.

The trial evidence disclosed that certain stock certificates of various corporations, bearing on their faces the names of their owners and unendorsed, were stolen from the homes of Bernard Hans in Forest Hills, New York and

* All sentences of letter opinion which appear in italics are underlined in original letter filed in Court.

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Fred W. Plate, Morristown, New Jersey, between May 26, and July 23, 1961. These securities were in the possession of the defendant Parness at a law office in New York City, where they were turned over to the co-defendant Grimmett by Parness in September or October of the same year. Parness was there accompanied by a person other than Hans, whom he introduced as Mr. Hains.

The co-defendant Grimmett was a citizen of Oklahoma and a controlling stockholder in an oil company, in financial straits. At this law office meeting, Grimmett informed Parness that he planned to borrow money on these securities, and would arrange to sell stock in his oil company to the bogus Mr. Hans. In connection with his disclosed plan to borrow on the securities Grimmett informed Parness that he would be able to secure a loan or loans thereon almost anywhere, and that he might do so at a bank in Oklahoma of which his brother was President. At the same meeting, Parness undertook to produce more securities the following day, of a character which would support a loan or loans up to one hundred percent of the face value of the additional securities.

On the day following the aforesaid meeting at the New York lawyer's office, Parness, Grimmett and the bogus Mr. Hans returned, and that afternoon, Parness reported to the attorney that the man referred to as Hans was having difficulty in procuring guarantees of endorsements upon the securities. The securities turned over by Parness were admitted in evidence and on their faces indicated that the transfer agents of the various corporations were located in various States, in addition to New York, and Parness

was therefore on notice that in order to effect a transfer of ownership of the stock on the books of the respective corporations, it would be necessary for at least some of the stock certificates to be transported interstate.

At this point in the testimony, the evidence was, in my opinion, amply sufficient to warrant the jury's concluding that Parness knew the securities to be stolen, and that he intended that cash should be raised upon the securities either by way of loan or sale. The jury could further infer that Parness expected or intended that he would be paid out of the moneys to be raised upon the securities, and undertook to produce additional securities, also stolen, for a similar purpose. The jury found, and in my opinion upon ample evidence, Grimmett caused the securities which he received at the conference at the lawyer's office to be transported between New York and New Jersey, and ultimately to Oklahoma City, Oklahoma. The jury was further justified in inferring from the evidence that if and when Parness produced the additional securities which he promised to obtain, they would be used for a purpose or purposes similar to that contemplated by Grimmett with respect to the securities which he actually received.

The foregoing evidence, in my opinion, justified the jury in concluding that Parnell (*sic.*) and Grimmett, together with the co-conspirators Favata and McLaren (*sic.*), conspired to cause securities which they knew to have been stolen, to be transported in interstate commerce in violation of 18 U. S. C. §2314. That conspiracy commenced on and with the occasion of the first meeting, at the office of the New York attorney and continued through January 5,

1962. Therefore, testimony of Favata, McLaren (*sic.*) and Gulihur (*sic.*) (the son-in-law of Grimmett) respecting, statements by and acts of Parness during the existence and in furtherance of the conspiracy, were properly admitted in evidence. From this evidence, the jury was warranted in concluding that Parness was a co-conspirator and participated in the furtherance of the conspiracy.

Parness saw fit to take the stand and testify in his own behalf. He testified that on October 11, 1961, he was introduced to Grimmett at the Savoy Hilton Hotel in New York City, who offered him American States Oil Corporation stock for a fifty percent loan. He subsequently met Grimmett at Orseck's law office, at which Bernard Hans brought the stock certificates which were admitted in evidence. Parness further testified that the deal which he was contemplating with Grimmett never worked out; and that he, Parness, went to the Orient on October 19, 1961 and returned to Anchorage, Alaska on October 31 of the same year. Parness admitted that he spoke to Gulihur (*sic.*) on January 2, 1962, who asked him to cash two cashiers checks for $25,000 each, and that he talked with Grimmett on the telephone on the same occasion, from whom he confirmed Gulihur's (*sic.*) request. He denies that Gulihur (*sic.*) gave him the $50,000 representing the proceeds of the checks, but admits that he met Gulihur (*sic.*) at a night club in New York City, while denying that he ever discussed transportation of securities between New York and New Jersey or elsewhere. The jury was justified in disbelieving the testimony given by Parness, and in inferring from

his incredibility that the evidence of his participation in the conspiracy thereby gained additional support.

The conspiracy charge against Parness is concededly based to a large extent, if not exclusively, upon circumstantial evidence. That evidence need not be inconsistent with every conclusion save that of guilt, provided it does establish a case from which the jury can find the defendant guilty beyond a reasonable doubt. Glasser v. United States, 1942, 315 U. S. 60; United States v. Seagraves, 3 Cir. 1959, 265 F. 2d 876; United States v. Monticello, 3 Cir. 1959, 264 F. 2d 47; United States v. Migliorino, 3 Cir. 1956, 238 F. 2d 7; and United States v. Georgia, 3 Cir. 1954, 210 F. 2d 45.

Submit order.

Very truly yours,

REYNIER J. WORTENDYKE, JR.
Judge, United States District Court

RJW,Jr/e
Original—Clerk

Appendix B

C. Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,503

UNITED STATES OF AMERICA

vs.

MILTON PARNESS and J. TOM GRIMMETT

MILTON PARNESS, *Appellant*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE ——— DISTRICT OF NEW JERSEY

Present:

McLAUGHLIN and FORMAN, *Circuit Judges*, and
LEAHY, *District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the ——— District of New Jersey and was argued by counsel.

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On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed April 30, 1963 in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF
Clerk

March 13, 1964

Appendix B

D. Judgment of Conviction in the District Court

On this 26th day of April, 1963 came the attorney for the government and the defendant appeared in person and by counsel

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of conspiracy to transport stolen securities in interstate commerce as charged in Count 1 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) years on Count 1.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Reynier J. Wortendyke, Jr.,
United States District Judge.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1085

MILTON PARNESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. B) is not yet reported. The "letter opinion" of the district court denying a motion by petitioner for a new trial (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1964. By order of Justice Brennan the time for filing a petition for a writ of certiorari was extended to and including May 11, 1964. The petition for a writ of certiorari was filed on May 8,

734-027—64

1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support petitioner's conviction for conspiring to transport forged and stolen securities in interstate commerce.

2. Whether statements by a co-conspirator should have been excluded because they referred to securities other than those introduced into evidence.

STATEMENT

After a trial by jury, petitioner was convicted in the United States District Court for the District of New Jersey on the conspiracy count of a three-count indictment charging him and J. Tom Grimmett with violations of 18 U.S.C. 371 and 2314. Petitioner was sentenced to imprisonment for five years. The court of appeals affirmed the conviction in a brief per curiam opinion.

The conspiracy count charged an agreement among petitioner, co-defendant J. Tom Grimmett, and Michael D. Favata and Patrick McLaren (co-conspirators but not defendants), to transport securities between New York City, East Paterson, New Jersey, and Oklahoma City, Oklahoma, knowing the securities to have been stolen and forged. The indictment alleged that, as part of the conspiracy, petitioner and others would sell to Grimmett approximately $1,000,000 of stolen securities to be forged and pledged as collateral for loans (R. 7a–8a).

Petitioner's contentions relate chiefly to the sufficiency of the evidence to connect him with the conspiracy charged in the indictment. Petitioner does

not challenge the sufficiency of the evidence, which was overwhelming, to prove the conspiracy itself.

The facts concerning the conspiracy, and petitioner's role therein, can be summarized as follows. In the spring and summer of 1961, various securities were stolen from the homes of Bernard Hans, in Forest Hills, New York, and Fred W. Plate in Morristown, New Jersey (R. 15a–30a). These securities were pledged by Grimmett in New York City on November 30, 1961, as collateral for a loan by an Oklahoma insurance company (R. 117a–133a, 338a–347a). Petitioner and others supplied the securities to Grimmett. Favata and McLaren contributed to the conspiracy by forging endorsements on the securities and by preparing various documents needed to pledge them (R. 68a–161a, 246a–279a).

Petitioner's connection with the conspiracy was proved largely through the testimony of two witnesses—Sidney Orseck and Larry Gullihur. Orseck, a New York City lawyer, testified that petitioner took part in a meeting at Orseck's office in late September or early October, 1961, which was also attended by Grimmett and an imposter identified as "Bernard Hans" (R. 32a, 33a, 41a). Grimmett introduced the bogus "Mr. Hans" as a person who was interested in exchanging certain "blue chip" securities, as well as money, for stock in a company in which Grimmett was active. Grimmett stated that he intended to use the "blue chip" securities as collateral for a loan, and that he could secure the loan "at any bank; or, if need be, he'd take them back home and have them pledge, [*sic*] the bank in which his brother was the president in Oklahoma, or some insurance company

out there" (R. 37a, 39a, 48a). Orseck, who was to prepare the necessary legal papers, asked to see the securities, whereupon Grimmett asked petitioner for them. Petitioner handed the securities to Grimmett (R. 37a, 51a, 52a). Orseck testified that most of Grimmett's remarks were directed to petitioner, and that petitioner knew the nature of the securities which "Hans" was going to exchange with Grimmett. When Grimmett complained that the value of the securities was insufficient for his needs, petitioner replied that "he didn't have the others with him, but that he had them and would bring them tomorrow or some later time" (R. 39a). The securities which petitioner turned over to Grimmett were those which had been stolen from Bernard Hans and Fred W. Plate.

Because the securities which had been brought to the meeting were not endorsed, the meeting was adjourned at Orseck's insistence. "Hans" was to have the securities endorsed and his signature guaranteed by the following day (R. 41a). The next day, petitioner, Grimmett, and "Hans" returned to Orseck's office. The securities were still not endorsed, however, and while the others remained, "Hans" left the office, allegedly to go to his bank where his signature could be verified (R. 42a). When "Hans" failed to return, petitioner and Grimmett left (R. 43a, 44a).

The securities were pledged by Grimmett with the aid of Favata and McLaren on November 30, 1961. On January 1, 1962, Larry Gullihur, who was Grimmett's son-in-law, went to New York City at Grim-

mett's request to deliver two checks, each in the amount of $25,000, to petitioner (R. 362a–364a). Accompanied by two unidentified persons, petitioner appeared at Gullihur's hotel room to collect the money, but when Gullihur tendered the checks petitioner said that "he had to have cash and his people would not accept checks, they had to have cash" (R. 366a). After conferring with Grimmett by telephone, Gullihur cashed the checks and gave petitioner the proceeds in bills of relatively small denomination (R. 366a–368a).

The government also elicited testimony as to various statements by Grimmett to Favata and McLaren in which Grimmett referred to "Milt" as the source of the stolen securities (R. 79a, 88a, 95a, 96a, 110a, 115a, 333a). In a few of these statements "Milt" was identified by Grimmett as petitioner, Milton Parness (R. 229a, 232a, 329a, 331a). The trial court instructed the jury that the statements could not be considered against petitioner unless independent evidence proved that petitioner was a member of the conspiracy (R. 483a, 484a, 497a, 499a).

ARGUMENT

1. Petitioner's statement that "there is not an iota of independent proof connecting petitioner to the alleged conspiracy", other than hearsay statements by Grimmett (Pet. 4), is refuted by the record. It ignores the testimony of Orseck, which showed that petitioner attended the meeting at Orseck's office at which the stolen securities were exhibited and at which Grimmett discussed his intention to pledge the

securities, and the testimony of Gullihur that he paid $50,000 in cash to petitioner at Grimmett's request. The testimony of these two witnesses was sufficient to link petitioner to the conspiracy and thus to establish a foundation for admitting into evidence hearsay statements by Grimmett identifying petitioner as the source of the stolen securities.

Petitioner also alleges that the government failed to show that he knew the securities would be sent into interstate commerce. The record shows that during the meeting at Orseck's office Grimmett stated his intention to pledge the securities "at any bank, or, if need be, he'd take them back home and have them pledge, [*sic*] the bank in which his brother was the president in Oklahoma, or some insurance company out there" (R. 39a). On cross-examination petitioner acknowledged that this statement had been made (R. 449a–450a). Petitioner also indicated on cross-examination that at one time he had intended to take the stolen securities and pledge them with a life insurance company, apparently located in Chicago (R. 442a). The evidence thus showed sufficient awareness on petitioner's part that the securities were likely to be transported in interstate commerce to satisfy the requirement of the statute. *United States* v. *Crimmins*, 123 F. 2d 271, 273 (C.A. 2).[1]

[1] The district court, in denying petitioner a new trial, pointed out that the securities indicated on their face that the transfer agents were located in states other than New York. Petitioner, who had the securities in his possession at the meeting at Orseck's office, was therefore on notice that the stock certificates would be transported interstate if the stocks had to be sold rather than pledged.

2. Petitioner contends it was error for the trial court to allow into evidence hearsay statements by Grimmett identifying him as the source of the stolen securities, on the ground that these statements were made in connection with securities other than those referred to in the indictment. The background for this contention is that in a motion for a bill of particulars, petitioner inquired whether the securities referred to in counts two and three of the indictment were the same as those mentioned in count one; the government replied that they were. At the trial, the government introduced only one batch of securities into evidence, those pledged by Grimmett on November 30, 1961. Grimmett's statements to Favata and McLaren identifying petitioner as the source of the securities were made generally in connection with efforts by Grimmett, after November 30, to obtain a second batch of securities from petitioner. Petitioner argues that because only the first group of securities was introduced, these statements should have been excluded.

Petitioner's claim is without merit. Grimmett's statements were clearly admissible under paragraph four of count one of the indictment, which reads:

> "It was further a part of the aforesaid conspiracy that approximately $1,000,000 of stolen securities would be sold by MILTON PARNESS and other [*sic*] unknown to the Grand Jury to J. TOM GRIMMETT and would be forged, altered, counterfeited and then pledged as collateral for loans." [R. 7a.]

The fact that only one batch of securities was introduced into evidence did not prevent the government from eliciting testimony relating to other securities.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
DAVID N. ELLENHORN,
Attorneys.

JUNE 1964

U.S. GOVERNMENT PRINTING OFFICE: 1964